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Workmen's Compensation

Henry D. Akin

WORKMEN'S COMPENSATION

by

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THE PRIMARY purposes of the Texas Workmen's Compensation Act[1] are to provide a sure and speedy means of supporting an employee injured in the course of his employment during his incapacity, to provide support for his family if death results, and to pay the employee for lost earning capacity. That such goals have not yet been attained in Texas is forcibly illustrated by the large number of workmen's compensation cases which reached the appellate courts of Texas during the past year. The following survey illustrates various aspects of many of these hotly contested lawsuits.

I. SUBSTANTIVE LAW

Eligible Non-Subscriber. Remarkable as it may seem, the courts continued to find it necessary to remind eligible non-subscribers choosing not to carry workmen's compensation insurance that they were deprived of the common law defenses of contributory negligence, assumed risk, and negligence of a fellow employee.[2]

Existence of Insurance. A local recording agent issued a binder by which he orally bound the insurance company he represented. The court held that the insurance coverage became effective before the issuance of the actual workmen's compensation policy.[3] Another recent case concerned a workmen's compensation policy providing that the insurance company could cancel the policy by mailing notice not less than ten days before the cancellation date stated in the notice. The court of civil appeals held that since the date of cancellation was only nine days after the mailing date the policy requirements were not strictly complied with and the policy was not effectively cancelled; that such rule of strict compliance with the cancellation provision is altogether appropriate for policies of workmen's compensation despite the general insurance rule that notice of cancellation effective immediately or within less time than provided in the policy is sufficient to cancel a policy of insurance at the end of the time stated in the policy; and that the general rule has not been applied in Texas workmen's compensation cases.[4]

Jurisdictional Requirements. A workmen's compensation claimant must

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[1] TEX. REV. CIV. STAT. ANN. arts. 8306-8309f (1967).

[2] Holiday Lodge Nursing Home, Inc. v. Huffman, 430 S.W.2d 826 (Tex. Civ. App. 1968); Grand Leader Dry Goods Co. v. Caveness, 424 S.W.2d 270 (Tex. Civ. App. 1968); Prewitt v. Waller, 423 S.W.2d 641 (Tex. Civ. App. 1967).

[3] United States Fire Ins. Co. v. Hutchinson, 421 S.W.2d 706 (Tex. Civ. App. 1967), *error ref. n.r.e.*

[4] United States Fire Ins. Co. v. Fletcher, 423 S.W.2d 89 (Tex. Civ. App. 1967), *error ref. n.r.e.*

give notice of injury to the employer or to the association within thirty days of the date of injury.[5] If a claimant pleads that such notice timely was given, this fact will be conclusively presumed unless denied by verified pleadings.[6] Claimant's testimony that he told the foreman of his injury on the day after it occurred was sufficient evidence to sustain the finding that employer had notice of injury within thirty days of the date of injury.[7]

A claimant must also file claim for compensation with the Industrial Accident Board within six months of the injury date.[8] In one case, a letter to the Board containing all the information required by law to be included in a claim for compensation was treated as a claim for compensation. The court of civil appeals held that use of a particular form, or of a form furnished by the Industrial Accident Board, was not required.[9] If good cause can be shown, and such good cause continues until the time of filing the claim for compensation, the requirement of actual filing within six months of the injury may be waived. The usual test for determining good cause is whether the claimant exercised the degree of care that an ordinarily prudent person would have exercised under the same or similar circumstances. However, where prior to the date the claim was filed the claimant had been suffering from a mental ailment bordering on psychosis, her behavior could not be judged by the usual standard. The court of civil appeals held that her mental condition constituted good cause for failure to file the claim.[10] Other circumstances held to constitute good cause were where the employer's personnel office told claimant that her claim forms had been filled out,[11] and where the employer told claimant that he (the employer) would file the claim and claimant relied on this representation.[12] Although other courts also found good cause to exist, they held the filing of the claim to be untimely because of lack of diligence after the good cause was removed.[13]

Two other requirements must be satisfied to confer jurisdiction on a court in a case appealed from an award of the Industrial Accident Board. Notice of unwillingness to abide by the award of the Board (notice of nonabidance) must be filed with the Board within twenty days of the date of the award,[14] and suit must be filed within twenty days of the date the notice of nonabidance was given.[15] In one case notice was deposited in the mail and in due course of mail should have reached the Board within twenty days. However, the notice was not received by the Board until the

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[5] TEX. REV. CIV. STAT. ANN. art. 8307, § 4a (1967).

[6] Texas Gen. Indem. Co. v. Hancock, 422 S.W.2d 565 (Tex. Civ. App. 1967); TEX. R. CIV. P. 93(n); TEX. REV. CIV. STAT. ANN. art. 8307b (1967).

[7] Texas Gen. Indem. Co. v. Thomas, 428 S.W.2d 463 (Tex. Civ. App. 1968), *error ref. n.r.e.*

[8] TEX. REV. CIV. STAT. ANN. art. 8307, § 5 (1967).

[9] Consolidated Mut. Ins. Co. v. Moronko, 425 S.W.2d 838 (Tex. Civ. App. 1968), *error granted.*

[10] Travelers Ins. Co. v. Garcia, 417 S.W.2d 630 (Tex. Civ. App. 1967), *error ref. n.r.e.*

[11] Allstate Ins. Co. v. Godwin, 426 S.W.2d 652 (Tex. Civ. App. 1968).

[12] Northwestern Nat'l Ins. Co. v. Kirchoff, 427 S.W.2d 638 (Tex. Civ. App. 1968).

[13] Consolidated Mut. Ins. Co. v. Moronko, 425 S.W.2d 838 (Tex. Civ. App. 1968), *error granted*; Texas Gen. Indem. Co. v. McIlvain, 424 S.W.2d 56 (Tex. Civ. App. 1968), *error ref.*

[14] TEX. REV. CIV. STAT. ANN. art. 8307, § 5 (1967).

[15] *Id.*

thirty-fifth day after the date of the award. The court held that the notice must actually reach the Board within the twenty-day period in order to confer jurisdiction on the court.[16] In a similar situation, the original petition appealing from the award of the Board was deposited in the mail and in the normal course of events would have been received and filed within twenty days from the date that notice of nonabidance was given. The petition was not delivered to the clerk of the court until the twenty-first day. The court held that the mandatory and jurisdictional requirement that the suit be filed within twenty days after giving notice of nonabidance must be followed, and that the rule of liberality and substantial compliance urged by claimant was not applicable.[17]

Course of Employment. To be compensable under the Workmen's Compensation Act an injury must be sustained in the course of employment.[18] Thus, the injury must be one having to do with and originating in the work, business, trade, or profession of the employer.

In *Meyer v. Western Fire Insurance Co.*[19] the Supreme Court of Texas held that although the general rule is that injuries sustained by a worker while traveling on the public streets or highways are not incurred in the course of employment, an exception exists if the worker was traveling on public streets or highways pursuant to the express or implied conditions of the employment contract. Thus a question of fact was raised as to whether claimant, who was deviating from his normal service route to stop by his employer's office to see if other duties needed to be performed in the neighborhood of his planned service calls, was within the scope of his employment at the time of his automobile accident.

Two other cases held that the employee was not within the course of his employment when he was injured on the highway, even though the employer furnished a vehicle to be utilized for employment duties. One case concerned an employee of a horse club who was injured en route to pay pasturage on his personally owned horse;[20] the other dealt with an employee who occupied the dual status of truck owner-lessor and truck driver-employee and who was injured while making a trip in his capacity as truck owner-lessor to pick up his personally-owned house trailer.[21]

In a case where an employee sustained injuries as a result of a beating administered by a fellow employee on his employer's premises during working hours, it was held that the injury was sustained in the course of his employment.[22] In another case the employee was not shown to be within the course of his employment when he was fatally burned in his own trailer house even though he was subject to call twenty-four hours of the day. The claimant failed to show how the fire started or its origin, and

[16] Yancy v. Texas Gen. Indem. Co., 425 S.W.2d 683 (Tex. Civ. App. 1968), *error ref. n.r.e.*
[17] American Gen. Ins. Co. v. Kohn, 425 S.W.2d 688 (Tex. Civ. App. 1968).
[18] TEX. REV. CIV. STAT. ANN. art. 8306, § 1 (1967).
[19] 425 S.W.2d 628 (Tex. 1968).
[20] Jones v. United States Fire Ins. Co., 420 S.W.2d 160 (Tex. Civ. App. 1967), *error ref. n.r.e.*
[21] Kelper v. Transamerica Ins. Co., 430 S.W.2d 539 (Tex. Civ. App. 1968), *error dismissed.*
[22] Liberty Mut. Ins. Co. v. Hopkins, 422 S.W.2d 203 (Tex. Civ. App. 1967), *error ref. n.r.e.*

thus failed to prove that the fire and death were not intentionally inflicted.[23]

A newspaper carrier was struck at an intersection while riding his own bicycle after leaving a home at which he had attempted to collect a delinquent account. The carrier was billed by his publisher in advance on the first of each month on the basis of the previous month's average daily delivery and his collection responsibilities were strictly his own. The court of civil appeals held that the injury was not sustained in the course of employment.[24]

In a telephone conversation with his employer, an employee in Albuquerque, New Mexico, was told to travel immediately to Midland, Texas, to begin employment and that his compensation would begin at the moment of departure. The court held that the facts were not too nebulous to weigh and that they supported the jury finding that the employee was acting in the course of his employment when he was killed in an automobile accident while traveling to Midland.[25]

Wage Rate. In spite of amendments to the statutes and a multitude of cases attempting to simplify wage rate questions, and despite the modern tendency to stipulate the average weekly wage because most employees are entitled to the maximum of $35 per week, technical points concerning the proper wage rate continue to crop up in the appellate courts.

In one case, the employee prior to the trial was paid $35 per week for eleven weeks. Because the only jury finding of his average weekly wage was unsupported by evidence, the court cut down the employee's compensation rate to the minimum of $9 per week.[26] A different result was reached where the employee had worked continuously for twenty-nine years and had been paid $26 per day. The court held that even though the average weekly wage issue was erroneously submitted to the jury, the employee was entitled to judgment for the maximum amount of $35 per week since no harm resulted.[27]

Where the employee worked 292 days during the year preceding her injury and earned $2,448, the court of civil appeals held the evidence insufficient to support a jury finding of an average weekly wage of $56 since the average daily wage of $8 multiplied by 300 and divided by 52 produces an average weekly wage of only $47.[28] The employee tendered a remittitur of the difference between $56 and $47, but the court of civil appeals refused to grant it. The supreme court reversed and remanded, ordering the court of civil appeals to allow the remittitur in compliance with rule 440, Texas Rules of Civil Procedure.[29]

Because the liberal construction given the Workmen's Compensation

[23] Thomas v. Travelers Ins. Co., 423 S.W.2d 359 (Tex. Civ. App. 1967), *error ref.*
[24] Cannedy v. Reliance Ins. Co., 425 S.W.2d 420 (Tex. Civ. App. 1968), *error ref. n.r.e.*
[25] North River Ins. Co. v. Hubbard, 391 F.2d 863 (5th. Cir. 1968).
[26] Garrard v. Texas Employers Ins. Ass'n, 423 S.W.2d 93 (Tex. Civ. App. 1967).
[27] Texas Gen. Indem. Co. v. Thomas, 428 S.W.2d 463 (Tex. Civ. App. 1968), *error ref. n.r.e.*
[28] Western Fire & Indem. Co. v. Dye, 423 S.W.2d 143 (Tex. Civ. App. 1967), *rev'd*, 426 S.W.2d 209 (Tex. 1968).
[29] Dye v. Western Fire & Indem. Co., 426 S.W.2d 209 (Tex. 1968).

Act requires only slight proof of the applicable wage rate when no real controversy is presented, one court held that the evidence supported the finding that an employee of the same class had worked in the same or similar employment for at least 210 days in the year immediately preceding the date of claimant's injury.[30] The court also stretched a point to put the employee, who had worked all over the state, in a neighboring place. However, another court refused to uphold an average weekly wage, testified to by claimant, of $60 to $65 per week where the employee was making a salary of $100 per month.[31] In another case the claimant stipulated that the average weekly wage of another worker doing the same job was $48 per week; thus the court of civil appeals can scarcely be criticized for not sustaining a jury finding of an average weekly wage earning capacity of $50 per week.[32]

Third Party Suit. One court held that a claimant who collected compensation benefits is not cut off from suing for malpractice the doctor who treated him, provided the doctor was not an agent, servant or employee of the subscriber.[33] In another case, a home rule city charter provided for notice to be given within sixty days of the injury as a condition precedent to any negligence suit against the city.[34] The injured employee recovered workmen's compensation but failed to give the required notice to the city. This notice requirement was held not repugnant to article 8307, section 6a, of the Workmen's Compensation Act, which requires the injured employee to elect to sue either the negligent third party or the insurance carrier. If the employee first sues the third party his right to workmen's compensation is cut off; but the employee may first sue the insurance carrier and, after final judgment, sue the third party with a right of subrogation in the insurance carrier. The court stated that there was "nothing inconsistent about requiring an injured party to give the notice of injury required by the charter provision even though it was his intention to proceed first against the compensation insurance carrier."[35] Thus the employee, not having complied with the notice provision, was prohibited from maintaining a suit against the city.

An insurance company lost its right of subrogation against an alleged negligent third party when it permitted the third party to take judgment against the injured employee without intervening in the suit. The insurance company stepped into the shoes of the injured employee, and by permitting judgment to be rendered against him, the company lost its own rights.[36]

A new way to cut off part of the insurance company's right of recoup-

[30] Argonaut Southwest Ins. Co. v. Morris, 420 S.W.2d 760 (Tex. Civ. App. 1967), *error ref. n.r.e.*

[31] General Accident, Fire & Life Assur. Corp. v. Callaway, 429 S.W.2d 548 (Tex. Civ. App. 1968).

[32] Gonzales v. Texas Employers' Ins. Ass'n, 419 S.W.2d 203 (Tex. Civ. App. 1967).

[33] Goodnight v. Phillips, 418 S.W.2d 862 (Tex. Civ. App. 1967), *error ref. n.r.e.*

[34] Wagstaff v. City of Groves, 419 S.W.2d 441 (Tex. Civ. App. 1967), *error ref. n.r.e.*

[35] *Id.* at 444.

[36] Evans v. Venglar, 429 S.W.2d 673 (Tex. Civ. App. 1968).

ment in a suit by the insurance company and the employee against a negligent third party is for the employee to fail to prosecute the suit until the third party settles with the insurance company, and then to reinstate the suit and enter into a separate settlement with the third party.[37]

The statute of limitations begins to run on an employee's action against a third party tortfeasor at the time the employee secures a judgment against the insurance carrier.[38] An employee who alleges in his compensation claim that he was employed by first employer and/or second employer and that he was employed by both employers cannot, after settling his compensation claim, sue the second employer as a negligent third party by alleging he was not really an employee of the second employer but only of the first employer.[39]

Setting Aside Compromise Settlement Agreement. While a suit to set aside a compromise settlement agreement is ordinarily brought on behalf of the injured employee, an insurance company was recently permitted to set aside a compromise settlement agreement on the ground of mutual mistake. The compromise settlement agreement was signed under the belief that the employer carried workmen's compensation insurance when, in fact, such coverage had been deleted from the policy. Even though the insurance company had demanded and accepted premiums sufficient to pay for workmen's compensation coverage, the court held that the company was not estopped to deny the coverage.[40]

II. Trial Procedures

Parties. A non-resident mother appointed as guardian of non-resident minors was the proper party to collect compensation for the death of the minors' father in the course of his employment.[41]

Pleading. The better practice is not to inform the jury of the amount and number of weekly payments which the law allows, for this informs the jury of the effect of its answers to special issues. Thus, reading to the jury a portion of the pleading to the effect that claimant was entitled to $35 a week for 401 weeks for total and permanent disability was error. But this practice did not constitute reversible error absent a showing of prejudice to the insurer.[42] No prejudice was shown when a witness testified to the same effect without objection.[43]

An alternative pleading stating that in the event claimant's incapacity

[37] Transport Ins. Co. v. Wheeler, 420 S.W.2d 635 (Tex. Civ. App. 1967), *error ref. n.r.e.*

[38] Mourning v. Crown Stevedoring Co., 417 S.W.2d 725 (Tex. Civ. App. 1967).

[39] Standridge v. Warrior Constructors, Inc., 425 S.W.2d 472 (Tex. Civ. App. 1968), *error ref. n.r.e.*

[40] Commercial Standard Ins. Co. v. White, 423 S.W.2d 427 (Tex. Civ. App. 1967), *error ref. n.r.e.*

[41] Kessler v. Texas Employers' Ins. Ass'n, 421 S.W.2d 133 (Tex. Civ. App. 1967), *error ref. n.r.e.*

[42] Texas Employers' Ins. Ass'n v. Hamilton, 430 S.W.2d 285 (Tex. Civ. App. 1968), *error ref. n.r.e.*; Superior Ins. Co. v. Sanchez, 428 S.W.2d 718 (Tex. Civ. App. 1968), *error ref. n.r.e.* (giving no significance to jury finding of 401 weeks total disability).

[43] Superior Ins. Co. v. Sanchez, 428 S.W.2d 718 (Tex. Civ. App. 1968), *error ref. n.r.e.*

is not total and permanent, then claimant is entitled to recover for whatever disability the preponderance of the proof may show, is sufficient to support findings of loss of use of claimant's left leg.[44]

Motion in Limine. Before a judgment will be reversed for erroneously overruling a motion *in limine*, a party must object to the evidence he sought to have excluded at the time it was offered.[45]

Evidence—Admissibility. Various questions pertaining to the admissibility of evidence were resurrected, with some cases holding the proffered evidence to be admissible[46] and others holding it inadmissible.[47] Likewise, still

[44] Aetna Cas. & Sur. Co. v. Harris, 428 S.W.2d 112 (Tex. Civ. App. 1968).

[45] Superior Ins. Co. v. Sanchez, 428 S.W.2d 718 (Tex. Civ. App. 1968), *error ref. n.r.e.*; Slayter v. Home Indem. Co., 426 S.W.2d 632 (Tex. Civ. App. 1968), *error ref. n.r.e.*

[46] Alexander v. St. Paul Fire & Marine Ins. Co., 430 S.W.2d 93 (Tex. Civ. App. 1968) (interrogating claimant concerning his claim of total and permanent disability from a prior injury and admitting his petition from prior suit would not constitute reversible error where objection was made only to document as a whole); Gonzales v. Texas Employers' Ins. Ass'n, 419 S.W.2d 203 (Tex. Civ. App. 1967) (pleading claimant's average weekly wage as $58 was not a judicial admission when abandoned by a stipulation of actual weekly wages of another worker of $48 where claimant had not worked the required 210 days); Hartman v. Maryland Cas. Co., 417 S.W.2d 640 (Tex. Civ. App. 1967) (evidence of the amount paid in settlement of prior unrelated claim was admissible where claimant voluntarily gave testimony as to such claim). *But see* Slayter v. Home Indem. Co., 426 S.W.2d 632 (Tex. Civ. App. 1968), *error ref. n.r.e.* (evidence as to beneficial effects of curative operation voluntarily undertaken by claimant was admissible notwithstanding absence of admission of liability by insurance company before the Industrial Accident Board); Travelers Ins. Co. v. Hutchison, 425 S.W.2d 832 (Tex. Civ. App. 1968) (opinion of expert based on personal knowledge from examination of patient and upon hearsay evidence is admissible); Monks v. Universal Underwriters Ins. Co., 425 S.W.2d 431 (Tex. Civ. App. 1968), *error ref. n.r.e.* (history of case given by injured employee to physician for purpose of enabling physician to diagnose his case is ordinarily admissible, but such history is not admissible when related to disputed issue of how injury occurred); Prewitt v. Waller, 423 S.W.2d 641 (Tex. Civ. App. 1967) (testimony that employers applied for a policy of workmen's compensation insurance on August 10, 1964, four days after the accident, was admissible for the purpose of showing that employers had three employees during 1964); Aetna Cas. & Sur. Co. v. Scott, 423 S.W.2d 351 (Tex. Civ. App. 1968) (claim for medical expenses under separate group policy stating medical expenses were not the result of an on-the-job injury was properly excluded where evidentiary substance of statement was previously revealed by oral testimony of claimant); Argonaut Southwest Ins. Co. v. Morris, 420 S.W.2d 760 (Tex. Civ. App. 1967), *error ref. n.r.e.* (doctor's statements to claimant regarding his physical condition were admissible where doctor was agent of compensation carrier).

[47] Alexander v. St. Paul Fire & Marine Co., 430 S.W.2d 93 (Tex. Civ. App. 1968) (although wife's testimony to the effect that claimant's back and leg hurt him when he attempted sexual intercourse was admissible for limited purpose of showing claimant's disability to work, exclusion of such testimony was not reversible error where it was merely cumulative of other testimony in record); General Accident, Fire & Life Assur. Corp. v. Callaway, 429 S.W.2d 548 (Tex. Civ. App. 1968) (it was not error to exclude evidence that co-defendant agreed to a settlement with claimant during the course of the trial where there was sufficient evidence to support a finding that claimant was employed by two employers on the date of his injury); Montoya v. American Employers Ins. Co., 426 S.W.2d 661 (Tex. Civ. App. 1968), *error ref. n.r.e.* (testimony from a lay witness that injuries are permanent are not admissible); City of Austin v. Webster, 424 S.W.2d 720 (Tex. Civ. App. 1968), *error ref. n.r.e.* (it was proper for the trial court to refuse to permit the defendant to introduce evidence of safety, advisability and probable beneficial effects of surgery upon plaintiff's back since the Industrial Accident Board had exclusive power to order and supervise an operation or to direct a medical examination for the purpose of determining the advisability of an operation); Argonaut Southwest Ins. Co. v. Pollan, 424 S.W.2d 38 (Tex. Civ. App. 1968) (testimony of witnesses as to whether they thought claimant would make misrepresentations concerning an injury and as to whether or not he was a malingerer was inadmissible where defendant had not questioned claimant's reputation for truth, honesty or veracity, nor his moral character); Argonaut Southwest Ins. Co. v. Morris, 420 S.W.2d 760 (Tex. Civ. App. 1967), *error ref. n.r.e.* (evidence of amount received in settlement of prior workmen's compensation claim is not admissible); Pacific Employers Ins. Co. v. Gibson, 419 S.W.2d 239 (Tex. Civ. App. 1967) (where physician had examined workman on only one occasion for the purpose of enabling him to render an opinion and his testimony relating to physical condition and estimate of dis-

more cases upheld the sufficiency of the evidence to support a variety of jury findings;[48] others held the evidence to be insufficient.[49]

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ability were based on history of case and subjective symptoms given by workman, the admission of such expert testimony was error); Aetna Cas. & Sur. Co. v. Tucker, 418 S.W.2d 382 (Tex. Civ. App. 1967), *error ref. n.r.e.* (claimant's petition in prior workmen's compensation suit alleging total and permanent disability as a result of a back injury was not admissible in subsequent suit where claimant asserted total and permanent disability resulting from another back injury and other injuries).

[48] The following cases held the evidence sufficient to support findings of total and permanent disability: Texas Employers' Ins. Ass'n v. Hamilton, 430 S.W.2d 285 (Tex. Civ. App. 1968), *error ref. n.r.e.* (in some situations it is not necessary to present physicians in order to prove extent of injury, as jury may draw inference of permanent disability from lay testimony and activities of claimant around his farm and his explanations constituted part of factual evidence to be considered by the jury but did not, as a matter of law, preclude award of compensation for total and permanent disability); Travelers Ins. Co. v. Luna, 428 S.W.2d 885 (Tex. Civ. App. 1968) (testimony of medical witness, though disputed in material parts, was sufficient to support a finding of total and permanent disability as a result of a fall where claimant injured her low back and right leg); Texas Gen. Indem. Co. v. Thomas, 428 S.W.2d 463 (Tex. Civ. App. 1968), *error ref. n.r.e.* (claimant was entitled to total and permanent disability where he continued to work subsequent to his injury only because of dire economic necessity in order to support himself and his wife); Aetna Cas. & Sur. Co. v. Harris, 428 S.W.2d 112 (Tex. Civ. App. 1968) (evidence sufficient to sustain judgment for 200 weeks compensation for injury to left leg and knee causing loss of use of leg for 401 weeks); Northwestern Nat'l Ins. Co. v. Kirchoff, 427 S.W.2d 638 (Tex. Civ. App. 1968) (evidence sufficient to sustain jury finding that when claimant lifted a 58-pound carton he sustained accidental injury to his back which was a producing cause of his total and permanent disability); Royal Indem. Co. v. Kennedy, 426 S.W.2d 615 (Tex. Civ. App. 1968), *error ref. n.r.e.* (even though claimant continued to work at a reduced amount of wages for a considerable amount of time and later quit General Motors to become a missionary causing his income to become drastically less than it was at the time of the injury, these circumstances constitute a part of the factual evidence and do not, as a matter of law, preclude award of compensation for total and permanent disability); Maryland Cas. Co. v. Sosa, 425 S.W.2d 871 (Tex. Civ. App. 1968), *error ref. n.r.e.*, 432 S.W.2d 515 (Tex. 1968) (total and permanent disability was held to result from a hand injury, but the supreme court did not approve the form of the special issue which inquired whether the specific injury "and the effects thereof" extended to and affected the claimant's shoulder); Texas Gen. Indem. Co. v. Hancock, 422 S.W.2d 565 (Tex. Civ. App. 1967) (expert as well as non-expert testimony supported finding of total and permanent disability resulting from fall in hospital); Highlands Ins. Co. v. Clements, 422 S.W.2d 218 (Tex. Civ. App. 1967), *error ref. n.r.e.* (evidence was sufficient to sustain finding that exposure to warm vapors having sour or foul smell precipitated viral infection such as herpes zoster (shingles) and produced loss of sight of eye and total and permanent disability); Texas Gen. Indem. Co. v. Ellis, 421 S.W.2d 467 (Tex. Civ. App. 1967) (evidence was sufficient to support finding of total and permanent disability under the old refrain of "whip of financial necessity" despite fact that claimant worked when he was not able to do so in order to support his wife, who had been sick from childbirth, and seven children); Argonaut Southwest Ins. Co. v. Morris, 420 S.W.2d 760 (Tex. Civ. App. 1967), *error ref. n.r.e.* (evidence supported finding of trial court without a jury that prior compensable injuries sustained by claimant did not contribute to his present total and permanent disability).

Other cases where the evidence was held sufficient to support the findings of the jury are as follows: Insurance Co. of N. America v. Kneten, 430 S.W.2d 565 (Tex. Civ. App. 1968), *error granted* (evidence sustained finding that electrical shock was producing cause of coronary occlusion although the doctor could not pin down whether heart attack occurred one or two days before shock or on day of shock); Cooper v. Argonaut Ins. Co., 430 S.W.2d 35 (Tex. Civ. App. 1968), *error ref. n.r.e.* (evidence was sufficient to support the finding that the hernia operation was successful despite evidence of soreness in the region of the hernia surgery some ten months thereafter); Western Cas. & Sur. Co. v. Jones, 429 S.W.2d 627 (Tex. Civ. App. 1968) (evidence was insufficient to sustain jury finding that claimant, hired by Garrison, a well driller, was not an employee of Nelson even though Nelson leased drilling equipment to Garrison and even if the lease and drilling arrangements made were to avoid carrying workmen's compensation insurance); General Accident Fire & Life Assur. Corp. v. Callaway, 429 S.W.2d 548 (Tex. Civ. App. 1968) (evidence was sufficient to support finding that claimant was employed by two companies on date of his injury); Aetna Cas. & Sur. Co. v. Calhoun, 426 S.W.2d 655 (Tex. Civ. App. 1968) (evidence sustained jury's finding that millwright had sustained a personal injury in the course of his employment where he died of coronary occlusion about fifteen days after taking welding test overhead and symptoms of heart damage began after the test and continued until his death); Frederick v. Travelers Ins. Co., 425 S.W.2d 61 (Tex. Civ. App. 1968), *error ref. n.r.e.* (evidence was sufficient to sustain jury's finding that injury to workman's left eye was not a producing cause of any loss of vision in that eye); Aetna Cas. & Sur. Co. v. Scott, 423 S.W.2d 351 (Tex. Civ. App. 1968) (evidence sufficient to support finding that the employee suffered compression

Conduct of Counsel. Since the court has no power to order or supervise an operation, it was improper for claimant's counsel in the presence of the jury to demand whether the insurance carried would pay all necessary expenses of an operation. The demand was not reversible error, however, because the court sustained the objection thereto.[50]

Court's Charge. Courts are not required to submit an issue both affirmatively and negatively, nor must they submit two issues covering the same subject matter, both of which place the burden of proof on the same party. Thus it was not error for the court to refuse to instruct the jury separately concerning matters covered by the special issue on "injury sustained in the course of employment."[51] Similarly, it was not error to require the jury to answer a special issue as to duration of incapacity by stating either permanent, the specific number of weeks, or none.[52]

In *Hardware Dealers' Mutual Fire Insurance Co. v. King*[53] the Texas Supreme Court held that the evidence conclusively established that claimant was employed in two capacities, *i.e.*, as a domestic servant in the home of an officer in the corporation and as a janitress in the corporation. The crucial question was whether claimant was injured while performing services in her capacity as a domestic servant. Thus, it was error for the trial court to refuse to submit to the jury insurer's requested special issue in-

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fracture due to accident while unloading steel from truck, and such injury was a producing cause of eight weeks and two days of total incapacity); Ross v. Nat'l Sur. Corp., 423 S.W.2d 163 (Tex. Civ. App. 1967) (evidence supported the findings that claimant had not sustained a lifting injury where physician testified employee complained only of orchitis which could not be caused by lifting); Cuellar v. Liberty Mut. Ins. Co., 420 S.W.2d 199 (Tex. Civ. App. 1967), *error ref. n.r.e.* (evidence sustained finding that claimant was employee of construction company which hired him rather than borrowed employee of trucking company delivering pipes to construction site); Bratton v. American Mut. Liab. Ins. Co., 419 S.W.2d 655 (Tex. Civ. App. 1967) (evidence supported finding of no total incapacity and only two weeks partial incapacity where log struck foot); Smith v. Liberty Mut. Ins. Co., 419 S.W.2d 400 (Tex. Civ. App. 1967) (evidence supported finding that claimant's injury did not result in any total or partial disability where doctor testified that claimant was normal except for her rather marked psychological overplay in nearly all her illnesses); Aetna Cas. & Sur. Co. v. Tucker, 418 S.W.2d 382 (Tex. Civ. App. 1967), *error ref. n.r.e.* (evidence was sufficient to sustain finding that injury was sustained on or about February 2, where claim, petition, and deposition set forth injury on February 25).

[49] In the following cases the evidence was held to be insufficient: Insurance Co. of N. America v. Chinowith, 393 F.2d 916 (5th Cir. 1968) (evidence was held to be insufficient to establish that surgery necessitated by injury to employee's legs aggravated and accelerated pre-existing cancerous condition resulting in employee's death); Cooper v. Argonaut Ins. Co., 430 S.W.2d 35 (Tex. Civ. App. 1968), *error ref. n.r.e.* (jury's finding that claimant had no injury to his back but only a hernia was against the overwhelming weight and preponderance of the evidence); Dotson v. Royal Indem. Co., 427 S.W.2d 150 (Tex. Civ. App. 1968), *error ref. n.r.e.* (no testimony was admitted based on reasonable medical probability that claimant sustained a heart attack when he felt a pain in his chest while assisting in unloading a shipment of automobile parts); Montoya v. American Employers Ins. Co., 426 S.W.2d 661 (Tex. Civ. App. 1968), *error ref. n.r.e.* (no description of the nature of claimant's injury existed from which jury could infer how long partial incapacity would last so as to support finding of permanent partial incapacity); Monks v. Universal Underwriters Ins. Co., 425 S.W.2d 431 (Tex. Civ. App. 1968), *error ref. n.r.e.* (evidence that claimant was removing wheel from an automobile at the time he had a heart attack, in the absence of evidence of strain, was insufficient to raise an issue of accidental injury); Employers Mut. Liab. Ins. Co. v. Parker, 418 S.W.2d 570 (Tex. Civ. App. 1967), *error granted* (testimony that radiation may have, could have, or possibly caused claimant's tumor was insufficient to support award for total and permanent disability due to cancer).

[50] Texas Gen. Indem. Co. v. Hamilton, 420 S.W.2d 735 (Tex. Civ. App. 1967), *error ref. n.r.e.*

[51] Liberty Mut. Ins. Co. v. Hopkins, 422 S.W.2d 203 (Tex. Civ. App. 1967), *error ref. n.r.e.*

[52] *Id.*

[53] 426 S.W.2d 215 (Tex. 1968).

quiring whether claimant was a domestic servant at the time and on the occasion in question.

In another case the trial court erred in failing to give oral admonitory instructions to the jury as required by rule 226a of the Texas Rules of Civil Procedure; however, the error was waived because the insurer failed to complain thereof timely.[54] The objection was considered untimely even though it was made concurrently with the insurer's filing of its motion for new trial.

Another court held that it was not error for the trial court to include in the definition of "accidental injury" the additional language "including neurosis bringing about malfunctioning of the physical structure of the body if it naturally and directly results from and can be traced to such occurrence at a definite time, place and cause," in the absence of an objection that the inclusion improperly accented and placed undue stress or emphasis on neurosis.[55]

Jury Misconduct. The "probably injury rule" is applied to jury misconduct in some cases. Under this rule, a party seeking a new trial because of misconduct of a juror has the burden of establishing to the satisfaction of the court that it reasonably appears from the evidence, both on the hearing for a motion for new trial and the trial of the case, as well as from the record as a whole, that injury probably resulted to the complaining party. However, casual improper remarks made by a juror during deliberation are harmless if it is not shown that the jurors related these remarks to the case before them.[56] A recent case held that discussion among the jury to the effect that plaintiff had received workmen's compensation and was attempting to recover twice for the same injury constituted grounds for a new trial as a matter of law.[57] A different result was reached in a case where defendant contended that the jury was guilty of misconduct. The jury discussed whether the defendant had insurance, and the foreman of the jury stated that if he had a manager who had not taken out insurance he would fire the manager. Because evidence that defendant did not have insurance was before the jury, and because the foreman's statement was made before actual deliberation, was not discussed, and was not even heard by some jurors, the court held that this conduct was not reversible error.[58]

In another case an eleven-to-one division in the jury continued into the second day of deliberation. One of the jurors, returning to the jury room after requesting certain medical testimony to be read back, said that a co-worker of his had broken his leg and had continued to limp after the X-rays showed that the break had healed. Soon thereafter the dissenting juror changed his vote, and a verdict was reached. The court of civil ap-

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[54] Dealers Nat'l Ins. Co. v. Simmons, 421 S.W.2d 669 (Tex. Civ. App. 1967), *error ref. n.r.e.*
[55] Superior Ins. Co. v. Sanchez, 428 S.W.2d 718, 720 (Tex. Civ. App. 1968), *error ref. n.r.e.*
[56] Dealers Nat'l Ins. Co. v. Simmons, 421 S.W.2d 669 (Tex. Civ. App. 1967), *error ref. n.r.e.*
[57] Goodnight v. Phillips, 418 S.W.2d 862 (Tex. Civ. App. 1967), *error ref. n.r.e.*
[58] Grand Leader Dry Goods Co. v. Caveness, 424 S.W.2d 270 (Tex. Civ. App. 1968).

peals held that the trial court was justified in concluding that the record did not show any probable prejudice to the defendant.[59]

Jury Findings. A necessary element of partial incapacity is the loss of wage earning capacity. In a recent case the jury found that claimant sustained partial incapacity but that his average weekly wage earning capacity during the period of partial incapacity was the same as his average weekly wage before the injury. Despite the conflicting jury findings, the case was not reversed by the court of civil appeals because the insurer judicially admitted that claimant's average weekly wage earning capacity during the period of partial disability was such that he would be entitled to the maximum $35 a week benefit.[60] This holding is entirely logical and is in accord with the clear provisions of the statute pertaining to partial incapacity from a general injury.

Less logical results were reached in two other cases. In one the court held that a claimant can be partially disabled without suffering reduction in earning capacity.[61] In the other, it was held a finding that claimant sustained partial disability and a finding that he did not sustain any loss in wage earning capacity were not in irreconcilable conflict.[62]

Another court found no conflict between a jury finding that the injury and effects thereof to claimant's left hand extended to and affected claimant's left shoulder, and a finding that claimant's injury was confined to his left arm below the elbow, since these findings could be reconciled in view of the dates involved.[63]

Judgment. The judgment should be reformed to exclude recovery of medical expenses incurred by claimant personally where there was no showing that the insurance company refused, failed, or neglected to furnish medical care to claimant.[64] Additionally, future medical services are not recoverable in a suit on a voluntary compensation policy,[65] and it is not error to include a provision in the judgment that future medical services were not included.[66]

The percentage of current incapacity attributable to a prior compensable injury should be deducted from current incapacity when computing the amount of the judgment.[67] However, the amount of the judgment against the insurance company should not be credited with personal policy payments made to an employee by his employer after the injury.[68]

Where the judgment of the trial court allowed a recovery of six per

[59] Aetna Cas. & Sur. Co. v. Scott, 423 S.W.2d 351 (Tex. Civ. App. 1968).
[60] Whaley v. Angelina Cas. Co., 423 S.W.2d 448 (Tex. Civ. App. 1967), *error ref. n.r.e.*
[61] Gonzales v. Texas Employers' Ins. Ass'n, 419 S.W.2d 203 (Tex. Civ. App. 1967).
[62] Malone v. Royal Indem. Co., 425 S.W.2d 54 (Tex. Civ. App. 1968).
[63] Maryland Cas. Co. v. Sosa, 425 S.W.2d 871 (Tex. Civ. App. 1968), *error ref. n.r.e.*, 432 S.W.2d 515 (1968).
[64] Travelers Ins. Co. v. Garcia, 417 S.W.2d 630 (Tex. Civ. App. 1967), *error ref. n.r.e.*
[65] Employers Mut. Cas. Co. v. Poorman, 428 S.W.2d 698 (Tex. Civ. App. 1968), *error ref. n.r.e.*
[66] City of Austin v. Webster, 424 S.W.2d 720 (Tex. Civ. App. 1968), *error ref. n.r.e.*
[67] Northwestern Nat'l Ins. Co. v. Kirchoff, 427 S.W.2d 638 (Tex. Civ. App. 1968); Consolidated Cas. Ins. Co. v. Jackson, 419 S.W.2d 232 (Tex. Civ. App. 1967), *error ref. n.r.e.*
[68] City of Austin v. Webster, 424 S.W.2d 720 (Tex. Civ. App. 1968), *error ref. n.r.e.*

cent interest on past due installments of compensation, the judgment was properly reformed to provide for interest at the rate of four per cent per annum compounded annually.[69] Likewise, judgment for a lump sum payment should provide for a discount of four per cent compounded annually.[70] Mere approval by the insurer of the judgment "as to form" did not invite the error on the part of the trial court in providing for six per cent interest instead of four per cent interest so as to estop the insurer from asserting the error, particularly where both parties were seeking to have the trial court's judgment reformed to comply with the law.[71]

[69] Consolidated Cas. Ins. Co. v. Jackson, 419 S.W.2d 232 (Tex. Civ. App. 1967), *error ref. n.r.e.*

[70] Dealers Nat'l Ins. Co. v. Simmons, 421 S.W.2d 669 (Tex. Civ. App. 1967), *error ref. n.r.e.*

[71] Consolidated Cas. Ins. Co. v. Jackson, 419 S.W.2d 232 (Tex. Civ. App. 1967), *error ref. n.r.e.*

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